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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Ex Parte No. 712**

***IMPROVING REGULATION AND REGULATORY REVIEW***

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**COMMENTS OF  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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**Dated: January 10, 2012**

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The National Industrial Transportation League ("League") respectfully submits its Comments to the Surface Transportation Board ("STB" or "Board") in response to the Board's Notice served on October 12, 2011, and clarified by decision served on December 21, 2011.<sup>1</sup> In the Notice, the Board announced that it will review its "existing regulations to evaluate their continued vitality and determine whether they are crafted effectively to solve current problems facing shippers and railroads." Notice, p. 1. The Board has requested comments on "whether any of its regulations may be outmoded, ineffective, insufficient, or excessively burdensome," and, if so, whether specific regulatory changes should be adopted to address any such concerns. *Id.* The Board's Notice was issued as a result of Presidential Executive Orders 13563 and 13579, in which executive agencies were directed to analyze existing regulations and develop a plan to make regulations more effective and less burdensome, as well as the President's request that independent agencies comply with Executive Order 13563 to the extent permitted by law. Notice, p. 2.

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<sup>1</sup> In the December 21, 2011 decision, the Board clarified that it "will consider comments on the existing and proposed regulations involved in the 12 proceedings cited in AAR's petition for clarification.....[and] intends to focus its analysis in this proceeding on whether there are long-standing regulations that have been shown to be obsolete or are otherwise in need of revision." Decision, p. 2.

## **I. INTRODUCTION**

The League's comments are focused on two significant areas of regulation that are wholly outdated and/or have been shown in practice to be inadequate to effectively address current problems in the railroad industry confronted by shippers that lack competitive rail service. These regulations include the Board's competitive access rules adopted over 26 years ago in Ex Parte 445 (Sub-No.1), which have *never* resulted in the granting of access to an alternative rail carrier. The insurmountable legal standards adopted by the Board's predecessor in decisions implementing the Ex Parte 445 Rules have discouraged shippers from even attempting to use the procedures in recent years, despite the substantial reduction in rail competition that has resulted from the rail mega-mergers of the 1990s. The League also seeks review and reform of the relief caps for small and medium rate cases adopted by the Board in Ex Parte 464 (Sub-No. 1), which have served to undermine the utility and purpose of the Board's small and medium rate case procedures.

The League also asks the Board to review its methodology used for revenue adequacy determinations which, as applied, has consistently failed to reflect the current market structure and strong financial health of the rail industry. Indeed, the Board's methodology has resulted repeatedly in illogical findings over the past 5 years that the majority of Class I railroads are revenue inadequate at a time when the railroad industry is one of the most profitable in the American economy.

The League also asks the Board to review and revise certain of its data requirements so that more meaningful and accurate information is available to shippers to allow the competitive market to work more efficiently. Finally, cognizant of the Board's full docket and resource constraints, the League encourages the Board to develop a plan for action to modify its

regulations, as justified from the comments received in this proceeding and other recent Board proceedings. The League respectfully offers a suggested approach for prioritizing the Board's actions based on its view of where regulatory changes are needed most to more effectively resolve existing problems between shippers and railroads.

## **II. STATEMENT OF INTEREST**

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907, and currently has over 600 company members. These company members range from some of the largest users of the nation's and the world's transportation systems, to smaller companies engaged in the shipment and receipt of goods. The majority of the League's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. The League's rail shippers are from a multitude of industries, including chemicals/petroleum, agricultural, forest products and paper, and steel, among others. Thus, the League has a very substantial interest in the regulations of the STB affecting interstate rail transportation.

## **III. THE BOARD SHOULD REFORM ITS COMPETITIVE SWITCHING RULES AS REQUESTED IN THE LEAGUE'S PETITION FOR RULEMAKING DOCKETED IN EX PARTE 711**

The League submits that the Board's top priority should be to reform its existing reciprocal switching rules that permit the Board to establish switching arrangements between rail carriers to facilitate rail competition. The existing rules for switching arrangements were

adopted over 2 decades ago in Ex Parte 445 (Sub-No. 1) (hereafter "Switching Rules")<sup>2</sup> but have *never* resulted in the establishment of new competitive switching arrangements.<sup>3</sup> Indeed, because the Board's rules and decisions implementing the rules erected insuperable barriers to obtaining competitive switching relief, no shipper has even attempted to bring a competitive switching case before the Board in recent years, despite the well documented concerns from captive shippers over inadequate rail competition following the mega-rail mergers of the 1990s. The denial of relief in every case in which a shipper sought to establish access via competitive switching to a second rail carrier and the subsequent chilling effect on future competitive access cases are facts that alone demonstrate that the current Switching Rules are outdated and ineffective to address problems faced by shippers.

The current Switching Rules also fail to fulfill the clear intentions of Congress that competitive switching arrangements should be used to provide relief to shippers served by only a single carrier. The Board's Switching Rules are intended to implement the broad and pro-competitive statutory provision adopted in the Staggers Act of 1980, which states that the Board "may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service."<sup>4</sup> The legislative history of this statutory requirement makes clear that competitive switching arrangements should be established where feasible to rectify competitive failures in the market. The Senate Report noted that "[i]n areas where reciprocal

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<sup>2</sup> See *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff'd sub nom.*, *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987). The Board's current reciprocal switching rules are codified at 49 C.F.R. § 1144.5.

<sup>3</sup> See *Midtec Paper Corp. v. Chicago and N. Western Transp. Co.*, 3 I.C.C. 2d 171 (1986), *affirmed* *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988); *Vista Chem. Co. v. The Atchison, Topeka and Santa Fe Ry. Co.*, 5 I.C.C.2d 331 (1989); *Shenango Inc., et al. v. Pittsburgh Chartiers and Youghiogheny Ry. Co.*, 5 I.C.C.2d 995 (1989) (involving a prescription for terminal trackage rights); and *Golden Cat Div. of Ralston Purina Co. v. St. Louis Sw. Ry.*, ICC Docket No. 41550, slip op. (served April 25, 1996).

<sup>4</sup> See Section 223 of the Staggers Act initially published at 49 U.S.C. § 11103(c) and subsequently recodified at 49 U.S.C. § 11102(c).

switching is feasible, it provides an avenue of relief for shippers served by only one railroad where service is inadequate."<sup>5</sup> The House Report stated that "[t]he Committee *intends for the Commission to permit and encourage reciprocal switching as a way to encourage greater competition.*"<sup>6</sup> Additionally, the Conference Committee Report specifically noted that the reciprocal switching provision was "included to foster greater competition."<sup>7</sup> The clear intention of Congress that competitive switching arrangements be established to create competition when necessary and feasible has not been satisfied, which further illustrates the need to reform the existing Switching Rules.

In its Notice, the Board also requested that parties advise as to how it should "modify, streamline, expand, or repeal [its rules], as appropriate." Notice, p. 1. As the Board is well aware, the League filed a comprehensive Petition for Rulemaking To Adopt Revised Competitive Switching Rules on July 7, 2011, which was docketed in Ex Parte 711. The League's petition was an outgrowth of the Board's Ex Parte 705 proceeding, *Competition in the Railroad Industry*, in which an extensive record was developed showing, *inter alia*, that since the Board's Switching Rules were adopted, there has been a significant loss of rail-to-rail competition and the financial health of the Class I railroads has improved so dramatically that the rail industry today is achieving record profits.

The League's petition was submitted in response to the Board's direct request in the Ex Parte 705 proceeding for parties to submit specific proposals as to how the Board could facilitate competitive rail service. The League developed a detailed proposal for new competitive switching rules and provided the Board with specific regulatory language that could be the subject of a new rulemaking proceeding. The League also attempted to establish a carefully

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<sup>5</sup> S.Rep. No. 96-470, at 42; *see also* H.R. Rep. No. 96-1430, at 116 (1980).

<sup>6</sup> H.R. Rep. No. 96-1035, at 67 (emphasis added).

<sup>7</sup> H.R. Rep. No. 96-1430, at 80.

balanced and reasonable proposal that would provide for switching relief only to captive shippers but not to shippers that have effective transportation alternatives. To obtain relief under the proposal, a shipper would be required to demonstrate a lack of competitive options and satisfy four clearly defined standards. The proposal was designed to reduce the need for complex litigation if a shipper could meet the conditions for certain conclusive presumptions applicable to demonstrate the shipper's captivity and lack of effective rail options and the existence of a working interchange.<sup>8</sup> Thus, a primary objective of the League's competitive switching proposal was to establish clear rules that could be implemented in a straightforward manner, without the need for costly litigation.<sup>9</sup>

The League continues to believe strongly that the initiation by the Board of a rulemaking that is based on the League's competitive switching proposal is an appropriate and necessary step that should be taken promptly by the Board. As plainly illustrated herein and in the Board's Ex Parte 705 and 711 proceedings, the current Switching Rules are outmoded, inconsistent with the intentions of the Staggers Act, and have been shown in practice to be wholly ineffective.<sup>10</sup> The commencement of a rulemaking is only the first step in what reasonably would involve a significant multi-year process of reforming the Board's Switching Rules. Although the Board deferred deciding the League's petition for rulemaking in a decision issued on November 4, 2011 in Ex Parte 711, based on its desire to further consider the comments filed in the Ex Parte 705 proceeding, the League maintains that the records in those two proceedings justify Board action

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<sup>8</sup> See the League's petition submitted in Ex Parte 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules.

<sup>9</sup> *Id.*

<sup>10</sup> See the following Comments all submitted in *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011): Comments of U.S. Dep't of Agric. at 6; Comments of The Am. Chemistry Council et al. at 67; Comments of The Fertilizer Institute at 8; Comments of Consumers United for Rail Equity at 12; Comments of The Dow Chemical Co. at 1; Comments of E.I. du Pont de Nemours & Co. at 12; Comments of Olin Corp. at 12; Comments of PPG Indus., Inc. at 8; Comments of Total Petrochemicals USA, Inc. at 5; Comments of Westlake Chem. Corp. at 5; Comments of The Nat'l Indus. Transp. League at 12.

today and that further delays are unwarranted. In fact, statements from key members of Congress at the Board's recent rail competition hearings encouraging the agency to act boldly to increase competitive rail service for captive shippers, as well as extensive support from a broad spectrum of shippers for reform of the Board's current Switching Rules, should cause the Board to act favorably on the League's petition. Accordingly, the League submits that reform of the Board's Switching Rules should be the Board's number one priority.

#### **IV. THE BOARD SHOULD INCREASE THE CAPS ON SMALL AND MEDIUM RATE CASES UNDER ITS RULES IN EX PARTE 646 (SUB-NO. 1)**

Another significant aspect of the Board's regulations that should be updated are the rate relief caps applied to the Board's Three-Benchmark and Simplified Stand-Alone Cost ("Simplified-SAC") rate case procedures. Increasing the relief caps, in particular, would make the Board's small and medium rate case rules more meaningful and useful, and provide a greater number of captive shippers with concerns over steeply rising rail rates with access to the Board's simplified rate procedures.

In September 2007, the Board established its Simplified-SAC procedures for medium-size rail rate disputes and modified its Three-Benchmark rules applicable to small rate disputes in Ex Parte No. 646 (Sub-No. 1). The primary objective of the Board's actions in the EP 646 (Sub-No. 1) proceeding was "to make its rail rate dispute resolution procedures more affordable and accessible to shippers of small and medium-size shipments, while simultaneously ensuring that the new guidelines do not result in arbitrary ratemaking."<sup>11</sup>

In its initial rulemaking, the Board proposed Simplified-SAC procedures for use when a full stand-alone cost methodology is too costly, given the value of the case; it proposed adjustments to the Three-Benchmark rules; and established eligibility presumptions to help

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<sup>11</sup> STB Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, Decision served Sept. 5, 2007, at 4.

clarify when a shipper may bring a large, medium or small rate case. The views of railroads and shippers differed sharply over when the small or medium procedures should be used and shippers, in particular, expressed concern over the eligibility standards proposed by the Board.<sup>12</sup> In its final decision, the Board dropped the proposed eligibility standards to help ensure that shippers had "a meaningful forum for seeking protection from unreasonable rates" but instead "place[d] limits of \$5 million on the relief available over a 5-year period under the Simplified-SAC method, and \$1 million on the relief available over the same period under the Three Benchmark approach."<sup>13</sup> In setting the relief caps, the Board sought to strike a balance between allowing a shipper to choose the rate procedures to be used based on the size of its case, while preventing large rate disputes from being decided under a simplified and less precise process.<sup>14</sup>

Despite the Board's desire to provide greater regulatory access to captive shippers involved in rate disputes, only very few complaints have been filed at the Board triggering the simplified rate processes.<sup>15</sup> In fact, the utility of the small and medium rate case procedures has been greatly diminished as a result of the rate relief caps. The League is aware of a number of companies that have been interested in pursuing rate relief by employing the small or medium rate case procedures. However, after analyzing the economics of their cases under the small and/or medium case rules, the relief that could be awarded was determined to be inadequate based on the value of the case. This has been found to be especially true with respect to the Three-Benchmark rules, which allows for only \$1,000,000 in rate relief over a five year period.

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<sup>12</sup> STB Ex Parte No. 646 (Sub-No. 1), Decision at 5.

<sup>13</sup> STB Ex Parte No. 646 (Sub-No. 1), Decision at 5, 27-29.

<sup>14</sup> STB Ex Parte No. 646 (Sub-No. 1), Decision at 28.

<sup>15</sup> Only two companies have filed small rate cases that have resulted in STB decisions, *E.I. DuPont de Nemours & Co.* and *U.S. Magnesium, L.L.C.*, see *E.I. DuPont de Nemours and Co. v. CSX Transportation, Inc.* in STB Docket Nos. 42099 (served June 30, 2008) 42100 (served June 30, 2008) and 42101 (served June 30, 2008) and *U.S. Magnesium, L.L.C. v. Union Pacific RR. Co.*, STB Docket No. 42114 (served Jan. 28, 2010). *U.S. Magnesium* is also the only company to seek rate relief under the Simplified-SAC procedures in two separate cases which were settled prior to the issuance of final Board decisions. See *U.S. Magnesium v. Union Pacific RR. Co.*, STB Docket Nos. 42115 and 42116 (served April 2, 2010).

With rail rates and their associated R/VC ratios rising rapidly in recent years, particularly for certain commodities such as chemicals, many shippers that are interested in pursuing a rate challenge are discouraged from bringing a case because they bump up against the relief cap well before expiration of the 5-year period. Ultimately, many such companies simply forgo pursuit of any rate relief due to the substantially higher litigation costs associated with the medium and large rate case rules.<sup>16</sup>

Accordingly, the League believes that the Board should open a rulemaking proceeding to increase the relief caps applicable to both the Three-Benchmark and Simplified-SAC procedures. In such proceeding, the Board could solicit additional comments as to how the rate relief caps have undermined the benefits intended to be afforded to shippers through increased access to simplified and more cost-effective regulatory procedures to resolve rate disputes.

**V. THE BOARD'S RULES TO DETERMINE REVENUE ADEQUACY DO NOT REFLECT THE FINANCIAL HEALTH OF INDIVIDUAL RAILROADS OR THE RAILROAD INDUSTRY, AND SHOULD BE REVISED BY THE BOARD**

It is beyond dispute that the railroad industry has achieved financial health. However, despite the railroads' strong financial condition, very few have been determined by the Board to be "revenue adequate." The League believes that the Board's rules to determine revenue adequacy should be revised to more accurately measure the railroads' true financial health and to make determinations that are consistent with other independent assessments of the industry's financial condition.

Evidence of the railroad's industry's strong financial condition is ubiquitous. The Report by the staff of the Senate Commerce Committee in 2010 concluded that "[a] review of the Class I railroads' recent financial results shows that the Staggers Act's goal of restoring financial

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<sup>16</sup> In 2007, the Board estimated that a full SAC case should cost the shipper no more than \$5,000,000 and a Simplified-SAC case should cost \$1,000,000. STB Ex Parte No. 646 (Sub-No. 1), Decision at 30.

stability to the U.S. rail system has been achieved.”<sup>17</sup> The Report also found that the four largest U.S. rail carriers have nearly doubled their collective profit margin in the last ten years,<sup>18</sup> and that freight railroads are “now some of the most highly profitable businesses in the U.S. economy.”<sup>19</sup> The Report noted that the four largest U.S. carriers had a return on revenue of 12.6% in 2008,<sup>20</sup> and their combined operating ratio was only 75.9%.<sup>21</sup>

Other sources confirm the conclusion of the railroad industry’s financial health. For example, in 2009, the railroads’ profit margin placed the industry fifth out of 53 industries on *Fortune*’s list of “most profitable industries.”<sup>22</sup> Between 2001 and 2008, the railroad industry was ranked in the top ten on *Fortune*’s profitability list seven out of eight times, and its growth in profitability had outpaced almost all other large industries.<sup>23</sup>

This conclusion has also been confirmed by Wall Street’s judgments. There has been strong investor interest in the freight railroad industry.<sup>24</sup> Reports of Wall Street analysts in recent years have been filled with glowing reports and positive projections of the financial health of the railroad industry. For example, a January 5, 2012 report by J.P. Morgan’s North American Equity Research states that railroad industry pricing performance is “likely to remain solid” and that there is likely to be “solid volume growth” in the coming year. J.P. Morgan North American Equity Research, *Tracking the Rail*, Week 52, January 5, 2012, p. 2. In its 2012 Freight Transportation Outlook, issued January 4, 2012, p. 31, J.P. Morgan projected earnings per share

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<sup>17</sup> Staff of Senate Committee on Commerce, Science and Transportation, 111th Cong., *The Current Financial State of the Class I Freight Rail Industry* (2010) (hereinafter “Senate Commerce Committee Report”), p. 3.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 14.

<sup>20</sup> *Id.* at 4-5.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Fortune*, *Fortune 500 Top Performers: Most Profitable Industries*, <http://money.cnn.com/magazines/fortune/fortune500/2009/performers/industries/profits/> (last visited April 11, 2011).

<sup>23</sup> Senate Commerce Committee Report, at 4-5.

<sup>24</sup> *Id.* at 5-8.

growth for the three major publicly-traded U.S. railroads to be 18% for CSX, 24% for NS, and 18% for UP. In its accompanying 2012 outlook, the company expected railroad pricing trends to remain "strong" J.P. Morgan Report, January 4, 2012, p. 1. Similarly, the Wall Street analyst Wolfe/Trahan in a January 4, 2012 report, "Inside Freight: A Look Back and a Look Forward for the Transports," page 1, indicates that it expects for the rail industry "strong pricing gains to continue" in 2012. These recent reports follow information issued throughout 2011 regarding the strong financial performance of the railroad industry.<sup>25</sup>

Despite this evidence of the railroads' financial health, only a single railroad (Union Pacific) was considered to be revenue adequate by the Board in 2010, just barely exceeding the Board's financial standard.<sup>26</sup> Very few railroads have met the Board's current cost of capital standard in recent years. In 2006, only three out of the seven Class I carriers were considered revenue adequate.<sup>27</sup> In 2007, only two of the seven Class Is were revenue adequate.<sup>28</sup> In 2008, just one carrier was revenue adequate, and in 2009 no carriers met the Board's ROI standard.<sup>29</sup> The Board's rules are clearly inconsistent with the judgments of the financial markets.

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<sup>25</sup> See, e.g., William Greene, Morgan Stanley, May 13, 2011, "Rail Fast Track: Shipper Survey Suggests Volume and Pricing Growth Strong," p. 1; Goldman Sachs Global Investment Research, May 12, 2011, p. 1, citing "solid . . . [rail] pricing growth" in 2011, with rail pricing at "inflation-plus levels (avg. 4.8%)"; Journal of Commerce Online, May 4, 2011, "CSX Splits Stock, Hikes Dividend, Buys Shares"; UTU News, March 25, 2011, "Rail execs remain bullish for 2011"; Dahlman Rose and Company Industry Note, May 2, 2011, p. 1, citing "all around good" financial news; [nsinfo@nscorp.com](mailto:nsinfo@nscorp.com) press release, May 12, 2011, citing "second highest revenues ever in 2010" and "record revenues, income from railway operations, and earnings per share in first-quarter 2011"; Thomas Wadewitz, J.P. Morgan North American Equity Research, May 19, 2011, citing the expectation of "continued pricing above rail inflation."

<sup>26</sup> *R.R. Revenue Adequacy — 2010 Determination*, STB Docket No. EP 552 (Sub-No. 15), slip op. at 1 (served Nov. 3, 2011).

<sup>27</sup> *R.R. Revenue Adequacy — 2006 Determination*, STB Docket No. EP 552 (Sub-No. 11), slip op. at 1, 3 (served May 6, 2008).

<sup>28</sup> *R.R. Revenue Adequacy — 2007 Determination*, STB Docket No. EP 552 (Sub-No. 12), slip op. at 1, 3 (served Sep. 26, 2008).

<sup>29</sup> *R.R. Revenue Adequacy — 2008 Determination*, STB Docket No. EP 552 (Sub-No. 13), slip op. at 1 (served Oct. 26, 2009); *R.R. Revenue Adequacy — 2009 Determination*, STB Docket No. EP 552 (Sub-No. 14), slip op. at 1 (served Nov. 10, 2010).

The League believes that the Board must review and revise its rules to determine revenue adequacy to ensure that such determinations reflect more accurately the railroads' robust financial health.

**VI. THE BOARD SHOULD REVISE CERTAIN OF ITS DATA COLLECTION REQUIREMENTS SO THAT ACCURATE INFORMATION IS AVAILABLE TO PERMIT THE COMPETITIVE MARKET TO WORK EFFICIENTLY AND TO BETTER SUPPORT ITS REGULATORY RESPONSIBILITIES**

It is virtually a truism that competitive markets need information to work efficiently. Indeed, the importance of information in the marketplace is standard fare in economic literature. See, e.g., Stiglitz, J., and Walsh, C. (2002), *Principles of Microeconomics*, 3rd ed. New York: W.W. Norton (2002), p. 228, 287; Case, K., and Fair, C., *Principles of Microeconomics*, 7th ed., Upper Saddle river, NJ; Pearson Prentice Hall (2004), 103, 321. Marketplace information is necessary to arrive at an efficient allocation of resources. Case, K., and Fair, C., *supra*, p. 325.

In the railroad industry, however, much information is controlled by the railroads themselves, which, especially given their geographic distribution, are collectively an oligopoly with little incentive to make information available. Indeed, a substantial part of the public information about the railroad industry comes from the Board itself, under regulations regarding the submission of information to the agency. The Board then publishes some of that information for the public, and permits litigants before the Board to access other information. See, e.g., 49 C.F.R. Part 1244 (Waybill Analysis of Transportation Property – Railroads) and 49 C.F.R. Part 148 (Freight Commodity Statistics); see, [http://www.stb.dot.gov/stb/industry/econ\\_reports.html](http://www.stb.dot.gov/stb/industry/econ_reports.html). Thus, the information about the industry required by the Board plays an important part in helping to make the rail marketplace more efficient and in the application of various regulatory remedies. The Uniform Rail Costing System (URCS), for example, is crucial in Stand-Alone Cost Determinations, and the Waybill Sample is a necessary element in the Board's Three-Benchmark

Small Case Procedures. See, Ex Parte 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, served September 5, 2007, slip op. at 17-18.

The League believes that the Board should carefully review its own information requirements to determine if there are areas in which the Board may improve the information available about the industry without unduly burdening the railroads. In the computer age, the burden of collecting information has clearly become less of an issue: for example, payments are made electronically; samples can be determined and drawn through a computer program rather than by hand; etc. Indeed, the Board's procedures for sampling waybill records by computer gives carriers the option of simply transmitting 100% of the applicable traffic data to the Board itself, which would apply the sampling procedure described in the regulations and then return the traffic tape to the carrier, keeping on file only the sampled data and control totals. See, *Surface Transportation Board Procedures for Sampling Waybill Records by Computer*, OMB Control No. 2140-0015, p. 1.

There are three specific areas in which the Board should examine its regulations on information and make changes to improve the quality and amount of information to the marketplace. First, under 49 C.F.R. Part 1248, carriers are required to report commodity statistics at the 3-, 4-, and 5-digit STCC commodity codes named in Section 1248.101 of the regulations. In turn, Sections 1248.100 and 1248.101 provide that, while most commodity data is to be submitted at the 5-digit STCC level, some commodity data is to be submitted at more generalized levels. These requirements were apparently developed in the late 1960s, when there were far more carriers in existence and it was therefore easier to determine individual shipper commodity flows of various carriers. That is no longer the case. The League understands that the BNSF has been submitting all data to the Board at the 5-digit STCC level for several years, a

practice that indicates that submission of all data at the 5-digit level is both practical and not harmful. The Board should change its regulations accordingly.

Second, under 49 C.F.R. 1244.4(c)(2), the Board requires sampling rates for computerized systems, ranging from 2.5% where there are up to two carloads on a waybill, to higher sampling rates where there are more carloads on a particular waybill. The League suggests that the Board increase its sampling rates for computerized sampling to no less than five percent (5%), so that more exact and detailed data can be developed. This change would be useful not only for the industry in general, but would be particularly helpful for litigants – both railroads and shippers – in Three-Benchmark cases before the Board. As the Board knows, litigants in such case are required to develop "comparable" rates on the basis of information contained in the Waybill Sample. See, Ex Parte 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, served September 5, 2007, slip op. at 17-18. A higher sampling rate would improve the amount and quality of information available to both complainants, defendants and the Board itself in such cases, with little or no added burden on carriers.

Finally, under 49 C.F.R. Section 1248.2, railroads are required to report various types of data for the QCS. The League suggests that ton-miles be included in the list of data elements. Such an addition would provide a useful piece of information about the industry, with no added burden to carriers.

**VII. THE BOARD SHOULD DEVELOP AN OVERALL PLAN TO RESPOND TO THE COMMENTS SUBMITTED IN A NUMBER OF RECENT PROCEEDINGS AND PRIORITIZE ITS ACTIONS TO REFORM ITS RULES IN A VARIETY OF AREAS**

Over the past eighteen months, the Board has taken extensive written and oral comments from shippers, carriers, governmental bodies, and a wide variety of other interested persons in a number of proceedings. These have included Ex Parte No. 704, *Review of Commodity, Boxcar*

*and TOFC/COFC Exemptions*; Ex Parte No. 705, *Competition in the Railroad Industry*; and Ex Parte No. 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*. Each of these proceedings has developed an extensive or informative record, and provided valuable comments to the Board about the state of the railroad industry and the effect of the Board's regulations on exemptions, competition, and a variety of other topics.

The League strongly believes that it is not enough for the Board to simply take comments and build records on these critical issues but that the Board should act to ensure that its rules and procedures are effectively responding to the issues and concerns arising in today's railroad industry, and not the industry that existed 20 or 30 years ago. Yet, despite the extensive nature of the comments in these proceedings and the request for Board action in a variety of areas, the Board has failed to initiate any response. The League is well aware that limited resources would make it difficult for the Board to act on every major issue at once, as a matter of administrative practicality. Therefore, the League believes that the Board should develop an overall plan to reform its rules in the various areas for which comments were sought in these proceedings, and in doing so should establish priorities for action.

To assist the Board, the League offers herein its suggested priorities for Board action, based on the input and needs of its broad shipper membership. First, and as noted above, the Board's top priority should be to open a rulemaking to reform its Switching Rules as requested by the League in Ex Parte No. 711. The impact of inadequate rail competition on captive shippers' businesses and the economy at large is the most critical issue that must be addressed promptly by the Board. The League believes that the importance of the competitive switching issue, the evident problems with the Board's current rules, the calls for Board action to increase competition by important members of Congress and the widespread support for the League's

petition by rail shippers of all major commodities, provides a compelling case for moving forward with the League's petition as the Board's first priority.

Second, the League is mindful of the fact that some shippers will be unable to access competitive remedies even if the relief sought in the League's Ex Parte No. 711 Petition is granted. For these shippers, there needs to be improvements in the Board's regulatory processes. Since the Board has revised its Stand-Alone Cost rules in its decision in Ex Parte No. 657 (Sub-No. 1), *Major Issues in Rail Rate Cases*, decision served October 30, 2006, the Board should focus on improvements to its small and medium case procedures. Thus, the League believes that the second priority for the Board should be to open a rulemaking to examine the Board's relief limits in such cases, and particularly in Three-Benchmark cases under Ex Parte 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, served September 5, 2007, as discussed in Section IV above.

Finally, the League believes that the Board should act with respect to shippers of exempt commodities. The League is mindful that this topic covers a wide variety of shipments and commodities. The League suggests that a practical way forward would be for the Board to open a proceeding to examine the status of the Board's current exemptions, initially for one or two commodities, selected on the basis of the record in Ex Parte No. 704 and the Board's own data indicating that certain exempt commodities have been subjected to dramatic rate increases in recent years. Additional exemption proceedings could be opened thereafter, with a purpose of revising its list of exemptions to reflect current market realities.

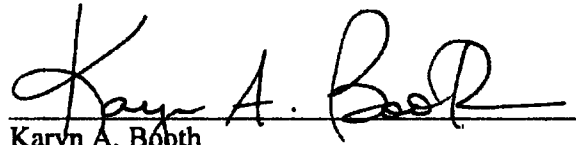
## VIII. CONCLUSION

The League appreciates the opportunity to provide its views in this proceeding.

Respectfully submitted,

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*By Its Attorneys*

A handwritten signature in black ink, appearing to read "Karyn A. Both", is written over a horizontal line.

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Dated: January 10, 2012